COORDINATED COURTS OF MENDOCINO COUNTY

STATE OF CALIFORNIA, UKIAH BRANCH

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

VS. Case No. C-24362

RAYMOND LAWRENCE FRAZER,
Defendant.

MINUTE ORDER RULING ON DEMURRER

This matter was before the court on January 7, 1997, for hearing on defendant, Raymond Lawrence Frazer's, demurrer to the complaint filed herein. (Section 1004 Penal Code.) William T. Rigsby , Attorney at Law, was present representing the defendant who has a waiver of personal appearance filed with this court. (Section 977 Penal Code). Elizabeth M. Norman, Deputy District Attorney, representing the People, was not present, having advised the court of her intention to submit the matter on the opposition papers filed herein. Defendant's counsel waived argument and agreed to submit the matter on the moving papers.

Defendant, Raymond Lawrence Frazer, is charged with a violation of section 288(a) of the Penal Code (PC), lewd and lascivious acts with a child under 14 years, occurring between the 1st day of October; 1984 and the 3 1st day of December 1984. The statute of limitations for this offense is six years, as set forth in section 800 PC, and therefore would have expired not later than January 1, 1991. The complaint filed herein on October 21, 1996, more than five years after the limitations expiration, alleges that this case falls under the provisions of section 803(g), effective January 1, 1994, and is therefore an exception to the six year limitation period. Section 803, subdivision (g), specifically provides:

> "Notwithstanding any other limitation of time prescribed in this section, a criminal complaint may be filed within one year of the date of a report to a law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5. This subdivision shall apply only if both of the following occur: (1) The limitation period specified in Section 800 or 801 has expired. (2) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding mutual masturbation which is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegations...."

Counsel, in their moving papers, have argued both the issue of statutory construction and the *Ex Post Facto* clause of the Constitution.

In considering counsels' moving papers, I am guided by the California Supreme Court's holding in Aetna Cas. & Surety Co. v Ind. Acc. Comm. (1947) 30 Cal.2d 388, at 393: "... statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." In accordance with this principle, Section 3, of the California Penal Code specifically provides that: No part of [this Penal Code] is retroactive unless expressly so declared." I have also considered the reasoning of the Appellate Courts in People v. Richard G. (1995) 35 C.A.4th 1099, (review granted S047826) and People v. King (1996) 48 C.A.4th 1134, (review granted S056411). While the court is clearly not bound by the Richard G. and King decisions, the reasoning of the Appellate Courts in such situations, occasionally provides the lower court with some additional insight into the issues. In Richard G., a case which originated in Mendocino County, the Appellate Court noted the People's argument that the wording of Section 803(g)(1) PC expresses a clear legislative intent to revive a Section 800 or 801 PC expired limitations period. However, the Court went on to point out that in their opinion the wording

was intended, not to revive prosecutions where the limitations period expired prior to the enactment of Section 803(g) PC, but to prevent Section 803(g) PC from creating a shorter limitation period than that prescribed by Sections 800 and 801 PC.

After reviewing all of the moving papers and arguments therein and the recent case law I am inclined to believe that, absent clear and express legislative intent in the statute, and the differing reasonable interpretations possible, we must be bound by the general legal principle noted above and set forth again in Tapia v. Superior Court (1991) 53 Cal.3d 282, 287, "It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retroactivity ... (citations.)" This principle, when considered in light of the fact that the Legislature was acting after asking for and receiving an opinion from the Office of Legislative Counsel of California which advised: "If Assembly Bill 638 of the 1991-92 Regular Session becomes operative, the constitutional provisions prohibiting ex post facto laws would prohibit the filing of a criminal complaint pursuant to Section 803 of the Penal Code, as amended by the bill, if the previously applicable statute of limitations has expired prior to January 1, 1993, the effective date of the bill." (Ops. Cal. Legis. Counsel, No. 29534, Oct 2, 1992, page 1.) With such legal advice in hand, it would seem that the Legislature, if they chose to ignore that advice, would have taken steps to be exceptionally clear in expressing a retroactive intent. It doesn't appear to me that they took such steps and therefore I believe that Section 803(g) PC, enacted with an effective date of January 1, 1994, applies only to prosecutions commenced after the effective date of the statute and in cases where the statute of limitation had not expired prior to that effective date. I believe such a finding is in accord also with the legal principal set forth in People v. Superior Court (Douglass) (1979) 24 Cal.3d 428, 435, "When the statute is susceptible of two reasonable constructions ... the defendant is ordinarily entitled to that construction most favorable to him."

While we may wish it were different in light of the extreme vulnerability of the victims in these cases, based on the above findings in respect to statutory construction, I do not believe the court needs to address the *ex post facto* issue, and the defendant's demurrer is sustained.

Dated: February 10, 1997

Donald R. Combest, Judge